



EXECUTIVE OFFICE OF THE PRESIDENT
OFFICE OF MANAGEMENT AND BUDGET
WASHINGTON, D.C. 20503

December 27, 1978

LEGISLATIVE REFERRAL MEMORANDUM

TO: Legislative Liaison Officer
Department of Agriculture
Department of the Interior
Department of Treasury
Department of Transportation
Department of Defense
Central Intelligence Agency
Civil Service Commission
Tennessee Valley Authority

SUBJECT: Justice draft bill regarding Federal Tort Claims Act (Similar to Administration proposal introduced in 95th Congress as S. 2117/H.R. 9219. The section analysis discusses changes.)

The Office of Management and Budget requests the views of your agency on the above subject before advising on its relationship to the program of the President, in accordance with OMB Circular A-19.

A response to this request for your views is needed no later than cob Friday, January 5, 1979. (Unless your oral or written comments have been received by that date, we will presume your concurrence in the proposal.)

Questions should be referred to Robert E. Carlstrom (395-3856) or to-----+-----} the legislative analyst in this office.

Bernard H. Martin for
Assistant Director for
Legislative Reference

Enclosures

cc: J.Komoroske/M.Arnold
F.White
D.Huron
H.Schreiber

**SPECIAL
SERVICE**

DRAFT

A BILL

To amend title 28 of the United States Code to provide for an exclusive remedy against the United States in suits based upon acts or omissions of United States employees, and to amend title 5 of the United States Code to permit a person aggrieved by a constitutional injury to initiate and participate in a disciplinary inquiry of the offending act or omission, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled.

That section 1346(b) of title 28, United States Code, is amended by striking the period at the end of the section and adding the following: ", or where the claim sounding in tort for money damages arises under the Constitution of the United States when such employee of the Government is acting within the scope of his office or employment, or under the color thereof, such liability to be determined in accordance with applicable Federal law."

SEC. 2(a) Section 2672 of title 28, United States Code, is amended by inserting in the first paragraph the following language after the word "occurred" and before the colon: ", or where the claim sounding in tort for money damages arises under the Constitution of the United States when such employee of the Government is acting within the scope of his office or employment, or under the color thereof, such liability to be determined in accordance with applicable Federal law".

SEC. 2(b) Section 2672 of title 28, United States Code, is amended by inserting in the first paragraph the following language after the amount "\$25,000" and before the word "shall", "or any

award, compromise, or settlement based on a claim arising under the Constitution of the United States".

SEC. 3(a). Section 2674 of title 28, United States Code, is amended by inserting in the first paragraph the following language after the word "claims" and before the comma: "based upon negligent or wrongful acts or omissions".

SEC 3(b). Section 2674 of title 28, is amended by adding as a third paragraph the following:

"The United States shall be liable, respecting the provisions of this title relating to tort claims arising under the Constitution of the United States, to the extent as recognized or provided by applicable Federal law, but shall not be liable for interest prior to judgment or for punitive damages: Provided, however, That for a claim arising under the Constitution of the United States, such compensation shall not be less than liquidated damages of \$1,000, plus a reasonable attorney's fee and other litigation costs reasonably incurred, except that when the violation complained of continues for more than one day, liquidated damages shall be the higher of \$1,000 or \$100 a day for each day of violation, up to a maximum of \$15,000 plus a reasonable attorney's fee and other litigation costs reasonably incurred: Provided, however, That the United States shall not assert as a defense to a tort claim arising under the Constitution of the United States, the absolute or qualified immunity of the employee whose violation is complained of or his reasonable

good faith belief in the lawfulness of his conduct except that the United States may assert such a defense if the violation complained of is that of a member of Congress, a judge, a prosecutor, or a person performing the function of such a person.

SEC. 4(a). Section 2675(a) of title 28, United States Code, is amended by inserting the following language after "employment,": "or upon a claim for money damages arising from the violation of the Constitution of the United States by any employee of the Government while acting within the scope of his office or employment or under the color thereof."

SEC. 4(b) Section 2675(a) of title 28, is further amended by changing the period at the end thereof to a semicolon and adding thereafter the following language:

"Provided, however, That class actions in conformity with the requirements of the Federal Rules of Civil Procedure may be instituted for money damages for a tort arising under the Constitution of the United States only if the claim presented to the appropriate Federal agency under section 2675(a) of title 28 expressly asserts the representative nature of the claim and specifically describes the class, the common interests of the claimant and such class, and the basis upon which the claimant believes he can fairly and adequately protect the interests of the class as their representative, and if otherwise deemed appropriate by the court before which the action is filed."

SEC. 5. Section 2678 of title 28, United States Code is amended by inserting at the beginning thereof the words "Except as otherwise provided by the third paragraph of Section 2674 of this title," and changing the word "No" to "no".

SEC. 6. Section 2679(b) of title 28, United States Code

is amended to read as follows:

"(b)(1) The remedy against the United States provided by sections 1346(b) and 2672 of this title for claims for injury or loss of property or personal injury or death resulting from the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment or for claims arising from the violation of the Constitution of the United States by an employee of the Government while acting within the scope of his office or employment is exclusive of any other civil action or proceeding arising out of or relating to the same subject matter against the employee whose violation or act or omission gave rise to the claim, or against the estate of such employee."

(b)(2) In no event shall a claim for tort arising from a violation of the Constitution of the United States by an employee of the Government while acting solely under color of office, lie against both the employee in his individual capacity and against the United States under sections 2675 and 1346(b) of title 28, United States Code."

SEC. 7. Section 2679(d) of title 28, United States Code, is amended to read as follows:

"(d)(1) Upon certification by the Attorney General that the defendant employee was acting within the scope of his office or employment at the time of the incident out of which the suit arose, any such civil action or proceeding commenced in a United States district court shall be deemed an action against the United

States under the provisions of this title and all references thereto, and the United States shall be substituted as the party defendant. After such substitution the United States shall have available all defenses to which it would have been entitled if the action had originally been commenced against the United States under this chapter and section 1346(b)."

"(d) (2) Upon certification by the Attorney General that the defendant employee was acting within the scope of his office or employment at the time of the incident out of which the suit arose, any such civil action or proceeding commenced in a State court shall be removed, without bond, at any time before trial, by the Attorney General to the district court of the United States of the district and division embracing the place wherein it is pending and be deemed an action brought against the United States under the provisions of this title and all references thereto, and the United States shall be substituted as the party defendant. After such substitution the United States shall have available all defenses to which it would have been entitled if the action had originally been commenced against the United States under this chapter and section 1346(b). The certification of the Attorney General shall conclusively establish scope of office or employment for purposes of such initial removal."

"(d) (3) The certification by the Attorney General under subsections (d) (1) or (d) (2) that the defendant employee was acting within the scope of his office or employment, or that he was acting solely under the color thereof, shall be binding and conclusive, provided however, that the defendant employee may request the district court of the United States before

which the suit has been filed or removed to alter or modify said
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certification or, in the event that the Attorney General has not made a
certification, to find and certify that said employee was active within the
scope of his office or employment, or alternatively, that he was acting
solely under the color of his office or employment.

"(d) (4) Where an action or proceeding under this chapter is
precluded because of the availability of a remedy through proceeding
for compensation or other benefits from the United States as pro-
vided by any other law, the action or proceeding shall be dis-
missed, but in that event the running of any limitation of time
for commencing, or filing an application or claim in, such proceeding
for compensation or other benefits shall be deemed to have been
suspended during the pendency of the civil action or proceeding
under this chapter."

SEC. 8. Section 2679 of title 28, United States Code, is
amended by adding a new subsection (f) as follows:

"(f) Where an action or proceeding under section 1346(b) or
2672 arising under the Constitution of the United States results
in a judgment against the United States or an award, compromise,
or settlement paid by the United States, the Attorney General
shall forward the matter for such further administrative investi-
gation or disciplinary action as may be appropriate to the head of
the department or agency by which the employee whose violation or
act or omission gave rise to the claim was employed."

"SEC. 9(a). The preamble to section 2680 of title 28, United
States Code, is amended to read as follows:

"Except for tort claims arising under the Constitution of the
United States, the provisions of this chapter and section 1346(b)
of this title shall not apply to and the United States shall not
substitute itself in
Approved For Release 2004/08/19 : CIA-RDP81M00980R001900060002-4

Approved For Release 2004/08/19 : CIA-RDP81M00980R001900060002-4
(b) section 1346(b) of the United States Code, is amended

by adding the following paragraph to the end thereof:

"Provided however, that the provisions of this chapter and section 1346(b) of this title shall not apply to and the United States shall not substitute itself in any claim arising from the activities of the Tennessee Valley Authority, the Panama Canal Company, a Federal land bank, a Federal intermediate credit bank, or a bank for cooperatives, regardless of whether the tort claim arose under the Constitution of the United States."

SEC. 9(c) Section 2680(h) of title 28, United States Code, is amended to read as follows:

"(h) Any claim arising out of libel, slander, misrepresentation, deceit, or interference with contract rights."

SEC. 10. (a) Subsections (a) through (d) of section 4116 of title 38, United States Code, are repealed, and subsection (e) of that section is amended by deletion of the designation "(e)", by deleting the words "person to whom the immunity provisions of this section apply (as described in subsection (a) of this section)," and inserting in lieu thereof the words "employee of the Department of Medicine and Surgery".

SEC. 10(b) Subsections (a) through (c) of section 224 of the Public Health Service Act, as added by section 4 of the Act of December 31, 1970, and renumbered (42 U.S.C. 233(a) through (e)), are repealed, and subsection (f) is amended by deletion of the designation "(f)".

SEC. 10(c). Subsections (a) through (e) of section 1091 of the Foreign Service Act of 1946, as added by section 119 of the Act of July 12, 1976 (22 U.S.C. 817(a) through (e)) are repealed.

SEC. 10(d). Subsections (a) through (e) of section 1089, title 10, United States Code, are repealed. Subsection (f) is amended by deleting the words "person described in subsection (a)" and inserting in lieu thereof the words "employee of the Armed Forces, the Department of Defense, or the Central Intelligence Agency,".

SEC. 10(e). Subsections (a) through (e) of section 307 of the National Aeronautics and Space Act of 1958, as added by section 3 of the Act of October 8, 1976 (42 U.S.C. 2458a(a) through (e)), are repealed, and subsection (f) is amended by the deletion of the

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designated "employee of the National Aeronautics and Space Administration" described in subsection (a)" and by the insertion in lieu thereof of the words "employee of the National Aeronautics and Space Administration".

SEC. 11. Section 2520, title 18, United States Code, is amended by adding the following paragraph to the end thereof:

"Provided however, that this section shall not apply to civil causes of action against officers or employees of the United States while acting within the scope of their office or employment, or while acting under the color of such office or employment."

SEC. 12. The provisions of this Bill shall apply to all claims and suits filed after the date of enactment hereof, and to all claims and suits pending on the date of enactment, provided that as to such pending claims and suits, or as to any causes of action known to an aggrieved party on or before the date of enactment, such aggrieved party, claimant or plaintiff may elect to retain his right to a jury demand if made prior to the date of enactment in the case of a plaintiff who has filed suit, or if such right has not expired by the date of enactment in the case of such plaintiff, claimant or aggrieved party. In a case in which a plaintiff elects to retain his right to jury demand, the provisions of Section 3 of this Act relating to liquidated damages, waiver of absolute or qualified immunity, and attorneys fees shall not apply."

SEC. 13. Title 5, United States Code, is amended by adding immediately after Chapter 77 a new chapter 78 containing a table of contents and new sections 7801, 7802, 7803, and 7804, 7805, 7806 and 7807 as follows:

"CHAPTER 78--EMPLOYEE DISCIPLINE

"Sec.

Approved For Release 2004/08/19 : CIA-RDP81M00980R001900060002-4

"7801. Definitions

"7802. Administrative Inquiries Generally.

"7803. Conduct of Employees of the United States.

"7804. Conduct of Former Employees and Presidential Appointees.

"7805. Individuals and Bodies Conducting Inquiries and Review.

"7806. Regulations.

"7807. Miscellaneous.

Section 7801. Definitions

For the purposes of this chapter:

(a) "Person means any person with rights recognized under the Constitution of the United States;

(b) "Federal agency" means a Federal agency, as defined in section 2671 of title 28, United States Code, which employs or employed an "employee" defined in subsection (c) of this section;

(c) "Employee", unless otherwise described, means a present "employee of the Government" as defined in section 2671 of title 28, United States Code;

(d) "Appointee of the President" means an employee of the Government, other than a uniformed member of the Armed Forces or Coast Guard, a Public Health Service officer, or a Foreign Service officer, appointed by the President with the advice and consent of the Senate; and

(e) "Disciplinary action" means removal, suspension without pay, reduction in rank or pay, admonishment or reprimand, or transfer, for such cause as will promote the efficiency of the service.

(a) A person who obtains a monetary recovery from the United States on a tort claim under section 2675 or section 1346(b) of title 28, United States Code, arising under the Constitution of the United States, may within 60 days thereafter request, as provided herein, an administrative inquiry of the conduct alleged or found to have given rise to the claim.

(b) A person who brings an action under section 1346(b) on a tort claim arising under the Constitution of the United States may, not earlier than 60 days nor more than 120 days thereafter, request, as provided herein, an administrative inquiry of the conduct alleged to have given rise to the claim.

(c) A federal agency which undertakes to conduct an administrative inquiry of the conduct of one of its employees, may in its sole and unreviewable discretion invite a person who may have been adversely affected by the alleged conduct to participate in the administrative inquiry to the extent provided by sections 7803(b) and (e).

(d) A person who has requested an administrative inquiry under subsection (b), or who has been invited to participate in an administrative inquiry under subsection (c), may not subsequently request an administrative inquiry into the same conduct under subsections (a) or (b).

"Section 7803. Conduct of Employees of the United States

(a) A request under section 7802(a) or (b) for an administrative inquiry with respect to the conduct of an employee of the United States shall be made to the head of the federal agency or his designee, by which the employee is employed. The request shall be accompanied by a written statement, certified and subscribed as permitted by section 1746 of title 28, of such facts

as are known to the person making the request regarding the conduct of the employee which is alleged to have violated such person's rights under the Constitution, and a request may be made with respect to the conduct of an employee whose identity is unknown if the request sets forth other information sufficient for the commencement of a hearing.

(b) The inquiry shall be conducted without unnecessary delay by the head of the agency or his designee. If after preliminary inquiry, the head of the agency or his designee finds that the matter is so unsubstantiated as not to warrant further inquiry, he may, upon notice to the person under this subsection, terminate such inquiry. A hearing shall be held with respect to the conduct of the employee if there is a genuine, material and substantial dispute of fact which can be resolved with sufficient accuracy only by the introduction of reliable evidence in a hearing and the decision of the agency in the matter is likely to depend on the resolution of such dispute. In his sole and unreviewable discretion, the head of the agency or his designee, may give to a person in the event of hearing the opportunity to examine and cross-examine witnesses, and to suggest witnesses to be called and documents to be produced, however, this discretion shall not be construed to provide access by unauthorized persons to information specifically protected from disclosure by statute, or by Executive order, relating to the national security, national defense or foreign affairs. The head of the agency or his designee shall determine whether disciplinary action is warranted, issue a statement of findings and, if appropriate, state the nature and degree of disciplinary action taken, and notify the person of the action taken by the agency and the reasons therefor.

(c) Except as provided by subsection (e), within 60 days or if no final agency action has been taken within one year after

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the inquiry was requested, the person may request an administrative review by the appropriate individual or body described in section 7805. The individual or body conducting the administrative review shall determine on the record whether the action taken by the agency was reasonable. If no final agency action has been taken, or if it is unable to conduct such review because it finds the record inadequate, it may remand to the agency for further proceedings or it may, in its discretion, supplement the record by taking additional evidence. The final decision shall be transmitted to the agency, the employee and the person requesting the review, and shall include a statement of findings and a recommendation, which except as provided by section 7807(d) shall be binding on the agency, with respect to disciplinary action against the employee.

(d) Except as provided by subsection (e), within 60 days after the issuance of a final decision on an administrative review, the person requesting the inquiry may petition for review of the final decision by a district court of the United States unless the conduct involved is that of a uniformed member of the Armed Forces as described in section 101(4) of title 10, United States Code, in which event he may petition for review by the United States Court of Military Appeals. The Court may deny the petition, affirm the decision, or set aside the decision and remand for further proceedings if it finds the decision to be arbitrary or capricious, or finds material factual determinations to be unsupported by substantial evidence, on the basis of its review of the decision, the reasons therefor, and the recommendation with respect to disciplinary action. The court's review shall be held in camera.

Approved For Release 2004/08/19 : CIA-RDP81M00980R001900060002-4

from disclosure by statute, by executive order relating to the national security, national defense, or foreign affairs, or in the court's own discretion if it determines that in camera review is necessary.

(e) The right to request an administrative review under subsection (c) and to petition for judicial review under subsection (d) shall not be available to a person who has not obtained a monetary recovery from the United States on a claim under section 2675 or in a suit under section 1346(b) of title 28, United States Code, arising under the Constitution of the United States, unless the agency which conducted this inquiry under section 7803(b) invited a person to participate and the agency additionally consents in its sole and unreviewable discretion to that person's requesting administrative or judicial review.

"Section 7804. Conduct of former Employees and Presidential Appointees.

(a) A request under section 7802 for an administrative inquiry with respect to the conduct of a former employee of the United States or a present or former appointee of the President shall be made to the appropriate individual or body described in section 7805.

(b) The individual or body conducting an administrative inquiry under this section shall conduct such inquiry without unnecessary delay and may in its discretion hold a hearing. Such individual or body shall prepare a written report of the results of the inquiry which shall include a statement of findings. Such report shall be served promptly on the person whose conduct is the subject of the inquiry and shall be made public not less than 30 days thereafter.

If, prior to public release of the report, the former employee or present or former appointee of the President submits to the head of

the agency or his designee a statement commenting on the substance of the report, such statement shall accompany the report when it is transmitted to any person and when it is made public.

"Section 7805. Individuals and Bodies Conducting
Inquiries and Review

An administrative inquiry under section 7804 or an administrative review under section 7803(c) shall be conducted by:

(a) The Secretary of Defense, or his designee, with respect to a uniformed member of the Armed Forces as described in section 101(4) of title 10, United States Code;

(b) The Secretary of the Department in which the United States Coast Guard is operating, or his designee, with respect to a member of the Coast Guard;

(c) The head of an agency with a personnel system under the Foreign Service Act of 1946, as amended (22 U.S.C. 801 et seq.), or his designee, with respect to an officer or employee of the Foreign service;

(d) The head of an agency with a personnel system under the Public Health Service Acts, as amended (42 U.S.C. 201 et seq.), or designee, with respect to an officer or employee of the Public Health Service;

(e) A body designated by the President within sixty days of enactment of this Act, other than the Central Intelligence Agency, the Federal Bureau of Investigation, the National Security Agency, the National intelligence components of the Defense Department or the

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an officer or employee while engaged in intelligence activities; or

(f) The Merit Systems Protection Board, or its designee, in any other case.

(g) A designee of a Secretary, agency head or entity described in this section, who conducts an administrative review shall not be responsible to or subject to the supervision or direction of any designee of the agency who conducted the administrative inquiry under review.

(h) No person who has been an employee of the Central Intelligence Agency, the Federal Bureau of Investigation, the National Security Agency, the national intelligence components of the Defense Department or the National Security Council or its component parts, during the preceeding two years may be appointed to serve on the body designated to conduct an administrative review under subsection (c).

"Section 7806. Regulations.

(a) Within 90 days after enactment of this chapter, the individuals and bodies described in section 7805 shall issue such regulations as are necessary and appropriate for the implementation of sections 7802-7805.

(b) Regulations issued by the Merit Systems Protection Board under this section shall be approved by the Attorney General.

(c) The head of each federal agency subject to the administrative review provisions of section 7803(c) shall comply

with the regulations issued by the particular administrative body designated by section 7805 to review administrative inquiries conducted by the federal agency pursuant to the section 7803(b), and shall 60 days after the effective date of such regulations, issue rules, regulations and instructions not inconsistent therewith.

(d) For purposes of promulgating regulations pursuant to this section, the body designated under subsection (e) of section 7805 shall be an "agency" of the government within the meaning of 5 U.S.C. 551 (The Administrative Procedure Act).

(e) All regulations issued under this section shall be published for public comment and subject to judicial review under chapters 5 and 7 of this title.

"Section 7807. Miscellaneous.

(a) Nothing in this chapter shall affect the rights of an employee to appeal or to seek review or other means of redress of any disciplinary action taken against him which he would have under other provisions of law. Provided, however, that an employee, who is the subject of a disciplinary action recommended by the Merit Systems Protection Board pursuant to subsection 7803(c), shall not be required by any other provision of law to take an appeal to the Merit Systems Protection Board prior to seeking judicial review of that action.

(b) An employee who is not entitled under other provisions of law to seek administrative or judicial review of disciplinary action

taken against an employee under section 7803(c), participate in such review and give evidence or testimony if a hearing is held, and, to the extent provided by section 7803(d), may petition for judicial review of a final decision if any disciplinary action recommended under subsection 7803(c) is greater than that proposed by the employing federal agency.

(c) Nothing in this chapter shall affect the availability of defenses which an employee may raise in any administrative or judicial proceeding.

(d) Nothing in this chapter shall require a federal agency to delay taking disciplinary action against an employee, or empower the Merit Systems Protection Board to reduce the severity of disciplinary action taken by an agency against an employee who would not have a right to seek the Merit Systems Protection Board's review of such action under other provisions of law.

(e) Nothing in this chapter shall authorize a federal agency to delay or refrain from taking disciplinary action against an employee in the absence of a request filed under section 7802(a) or (b)

(f) On or before March 30 of each calendar year, the President shall submit to the Speaker of the House and the President of the Senate a report for the preceeding year separately listing for each Federal agency the number of administrative inquiries undertaken pursuant to this chapter, a brief description of the nature and disposition of the inquiries, including any administrative or judicial review thereof.

(g) Notwithstanding any provision of law to the contrary, any party who was a complainant in or a subject of a discipline proceeding may, in an action for judicial review of agency action under section 7803(d), recover reasonable attorneys'

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fees, fees and reasonable costs of experts, and other reasonable costs of litigation, including taxable costs, incurred during judicial review if the court affords such person the relief sought in substantial measure. Reasonable attorneys' fees and other costs of litigation awarded under this section shall be based upon prevailing market rates for the kind and quality of the services furnished."

SEC. 14. The provisions of this Act shall be effective only for a period beginning upon the date of its enactment and ending upon a date five years after the date of enactment, at which time the affected statutory provisions in effect on the day prior to the date of enactment shall be revived, the provisions of section 108 of title 1, United States Code, to the contrary notwithstanding. Provided however, that any claim, suit, or discipline action filed or initiated during the five year effective period of this Act shall not be affected by the end of the five year effective period of this Act.

Section 1

Approved For Release 2004/08/19 : CIA-RDP81M00980R001900060002-4

Section 1 amends section 1346(b) of title 28, United States Code, to include under the Federal Tort Claims Act claims based on tortious conduct arising under the Constitution founded on a so-called Bivens theory as enunciated by the Supreme Court in Bivens v. Six Unknown Named Agents of the Bureau of Narcotics, 403 U.S. 288 (1971). The language also provides that in a Bivens cause of action, liability will be determined in accordance with federal law. In non-Bivens or common law negligence actions brought under the Federal Tort Claims Act, liability is determined in accordance with applicable state law. Federal law is utilized when the claim is based upon an alleged tortious violation of the federal Constitution because of the clearly unique federal nature of the claim.

Section 2(a)

Section 2(a) amends section 2672 of title 28 in the same manner that Section 1 amends section 1346(b). The Section conforms the administrative claim jurisdiction to include claims for Constitutional tort violations, just as Section 1 broadened the jurisdiction for a Federal Tort Claims Act lawsuit.

Section 2(b)

Section 2(b) additionally amends section 2672 by providing that, regardless of amount, all awards, compromises, or settlements made by an agency on tort claims arising under the Constitution be effected only with prior approval of the Attorney General. Certification by an agency that a claim arose under the Constitution is required in order to ascertain whether the person receiving the

compensation will be entitled to initiate and participate in an administrative inquiry respecting the offending conduct as provided by Section 13 of the Bill. In order to ensure that uniform standards are applied by an agency in determining whether conduct rises to the level of a tortious constitutional tort, the amendment to section 2672 requires the Attorney General or his designee to approve the proposed finding of constitutional injury prior to completion of the award, compromise, or settlement.

Section 3(a)

Section 3(a) amends section 2674 of title 28, which is the section of the Federal Tort Claims Act that provides the method of determining liability. The first paragraph of Section 2674 is amended to make clear that the provisions of the first paragraph apply only to Federal Tort Claims Act suits based upon negligence theories as distinguished from Constitutional deprivation allegations.

The second paragraph of Section 2674 remains unchanged.

Section 3(b)

A new third paragraph of section 2674 is provided by Section 3(b) to establish that liability and damages in any Federal Torts Claims Act suit based upon alleged tortious constitutional deprivations will be determined by Federal law. The new third paragraph also contains two provisos. The first such provision establishes that for claims based upon proven tortious acts or omissions arising under the Constitution of the United States, compensation shall not be less than liquidated damages of \$1,000, and in the case of continuing violations, such as warrantless

electronic surveillance or mail openings in violation of the Fourth Amendment lasting several days or weeks, not less than \$100 per day for each day of violation not to exceed \$15,000 or \$1,000, whichever is higher, plus in either case a reasonable attorney's fee and other litigation costs reasonably incurred. These provisions are drawn from Section 2520 of Title 18, United States Code, which establishes a civil cause of action for the interception of wire or oral communications. The provisions of Section 2520 are implicitly incorporated into the Federal Tort Claims Act to the extent conduct actionable under Section 2520 constitutes tortious conduct under the Constitution and a later part of the Bill (Section 11) amends Section 2520 to provide that it shall not apply to civil damage remedies against federal employees who are acting within the scope of their office or employment, or acting under color of such office or employment. The liquidated damages provision, however, has been broadened to cover all constitutional torts of a continuous nature in addition to the interception or disclosure of wire or oral communications. Thus, although a claimant would no longer have a remedy against the federal employee personally, it is clear that such a claimant would lose nothing by the passage of this Bill with respect to constitutional torts because the same or broader remedy, except for punitive damages, would be available against the United States pursuant to the Federal Tort Claims Act.

The second proviso to the third paragraph of section 2674 provides that the United States shall not assert as a defense to a suit based on an alleged tort arising under the Constitution, the absolute or qualified immunity of the employee including his reasonable good faith belief in the lawfulness of his conduct.

Exception is made in cases involving members of Congress, judges
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or prosecutors, or those performing such functions, in which case
the United States may assert whatever immunity defenses are recog-
nized by law. The purpose of the amendment is to ensure that
victims of tortious constitutional injury in most cases will
receive at least liquidated damages upon proof of injury. The
amendment is in response to the situation confronting litigants
who seek financial redress under contemporary law from individual
government employees for alleged constitutional injuries. In
virtually all cases, employees are able to defeat recovery by
demonstrating a reasonable good faith belief in the lawfulness of
their conduct despite the existence of a tortious constitutional
injury. The amendment to section 2674 would guarantee recovery
of at least liquidated damages upon a showing of tortious consti-
tutional injury despite the good faith belief of the employees
involved. Exception is made with respect to Members of Congress
for whom immunity is prescribed by the Constitution and cannot
be waived by statute, and for judges,

and prosecutors who by the nature of their professions
inevitably, yet unintentionally, transgress constitutional limitations when ruling
upon and prosecuting areas of the law which may be uncertain or ill-defined.
The scope of immunity for these persons, and those performing like
functions such as their assistants, would be determined by federal law.

Section 4(a)

Section 4(a) of this Bill makes applicable to constitutional
torts the same conditions precedent to the institution of suit as
are applicable to negligence suits by including a specific

reference, to constitutional torts in §2675(a). Section 2 of the
Approved For Release 2004/08/19 : CIA-RDP81M00980R001900060002-4
Bill amended Section 2672 to conform the administrative claim
jurisdiction to include claims for constitutional violations.

The disposition of such claims, as provided in Section 2675,
is the logical extension of the earlier amendment.

Section 4(b)

Section 4(b) amends Section 2675(a) of title 28, by adding
a proviso to permit class actions, if appropriate, in claims
based upon constitutional violations. The proviso requires,
however, that the administrative claim presented to the
agency expressly state the representative nature of the claim,
a specific description of the members of the class, the common
interests of the claimant and such class members and the basis of
claimant's belief that he can fairly and adequately protect the
interests of the class as their representative. The inclusion
of this proviso serves two purposes. First, it apprises the
agency that injury has been sustained by a class of which the
claimant claims to be a member and affords the agency an opportunity,
administratively, to consider and pass upon such a claim. Second,
by presenting a claim as a class claim, the Government will be
precluded from moving to dismiss a subsequently instituted class
action on the ground that the conditions precedent to suit had
not been met administratively. Of course, any suit seeking class
action certification from the court would be required to meet the
requirements of the Federal Rules of Civil Procedure, particularly
Rule 23, even though a class-type claim had been filed.

Section 5

Section 5 amends section 2678 of title 28 by excluding from its
provisions regulating attorneys' fees, fees and costs incurred in

the litigation of a tort claim arising under the Constitution which are controlled by the provisions of Section 3(b) which amends section 2674 of title 28. Attorneys' fees provided by section 2674 shall be separate from any damage award whereas attorneys' fees for non-constitutional torts provided by section 2678 shall be a portion of and be payable by the client out of the judgment rendered.

Section 6

Section 6 of the Bill amends section 2679(b) of title 28 to provide immunity to individual federal employees. In its existing form, Section 2679(b) immunizes only federal employees who are operating automobiles. As amended, the Section would immunize all federal employees from civil damage lawsuits. Thus, the Section is the logical culmination of the series of statutes which on a piecemeal basis afforded immunity to specific categories of federal employees. With regard to traditional negligence suits, the federal employee is immune from suit if the acts or omissions which gave rise to the lawsuit were performed within the scope of the office or employment of the employee. Immunization of federal employees by providing an exclusive remedy against the United States will not alter a plaintiff's ability to obtain discovery from the federal government. A plaintiff will be entitled to such discovery as is permitted by the Federal Rules of Civil Procedure.

The bill further expands the immunity of federal employees by providing the applicability of the immunity to suits which are based upon alleged tortious constitutional deprivations or violations. The applicable immunity is broader in such cases than in traditional negligence cases by virtue of the language of new section 2679(b) (2) which gives a plaintiff the option of suing either the United States or the employee.

undertaken by the employee solely under the color of his office
Approved For Release 2004/08/19 : CIA-RDP81M00980R001900060002-4
and outside the scope of his employment. Should the plaintiff
elect to sue the United States, his remedy will be exclusive and
the employee will be immune from suit.

The broadened applicability of the immunity is thought necessary because it is in the "Constitutional tort" cases in which the most difficult scope of employment questions arise. Because the basic purposes of the Bill are to provide a meaningful remedy to victims of Constitutional wrongs, to protect individual federal employees from money damage lawsuits, and to eliminate the necessity of having the Department of Justice hire private counsel to represent individual federal employees, it is felt important to effectuate these goals by providing the possibility of broad coverage of the immunity in the Constitutional tort area. It is thought preferable to use the "color of office" language rather than to define or try to use specific language because such specific definitions would limit flexibility in individual cases and would perhaps be counterproductive in excluding coverage in future cases that are currently unanticipated. The option for a plaintiff to sue the individual is provided in recognition that conduct performed solely under color of office could be

motivated purely for personal reasons so as not to warrant guaranteed immunity from civil suit. Should the plaintiff elect to proceed against the employee, the plaintiff could not also sue the United States.

Concerning whether employees will remain subject in those common law negligence cases in which the United States has not waived sovereign immunity, the section intends that no claimant be without a remedy against either the United States under the Federal Tort Claims Act or against the employee, if the United States may not be sued under the Federal Tort Claims Act. For example, §2680 of title 28 contains certain exceptions which preclude suit against the United States, such as a claim arising out of a loss, miscarriage or negligent transmission of letters or postal matter. If a federal employee could be sued for an act encompassed by that exception, the United States would not seek to substitute itself because it has not waived its sovereign immunity from such a suit and the suit would continue against the individual employee. The same would be true with respect to any other exception enumerated in §2680. However, the United States will have waived its sovereign immunity from suit based upon a tortious violation of a constitutional right where the violation occurs as a result of conduct performed within the scope of the employee's office or employment. Should a claim based upon a tortious constitutional violation be alleged which might otherwise fall within the exceptions to §2680, the remedy against the United States would be exclusive and the United States would substitute itself. It is unlikely that a proper constitutional tort claim can be predicated under the exceptions which remain in §2680 and in most instances the Attorney General would represent the employee who is individually sued.

Section 7

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Section 7 amends section 2679(d) of title 28 to make the lan-

guage more specific. The original subsection (d) was somewhat confusing and produced some problems even in routine automobile accident cases. The cause of that confusion was that the pre-existing statutory language attempted to cover both suits brought in state and federal court. However, without treating them separately it is extremely difficult to cover all contingencies with specificity. The subsection is further subdivided into four paragraphs. Subsection (d)(1) would apply to suits originally brought in a federal district court. Subsection (d)(2) applies to suits which are originally brought in a state court. A suit brought in state court is removed to federal court and thereafter it is treated just as if it had been brought originally in federal court against the United States under the Federal Tort Claims Act. Both of these subsections provide that the suit shall proceed against the United States just as if it had originally been brought against the United States, and the United States will have available all defenses to which it would have been entitled had the action originally been brought against the United States. For purposes of removal of an action brought in a state court, the certification by the Attorney General that the defendant employee was acting within the scope of his office or employment is conclusive.

Subsection (d)(3) provides that the Attorney General's determination that an employee was not acting within the scope of his office or employment or under color thereof or that he was acting solely under color of his office may only be challenged by the employee whose conduct is the subject of the certification. Permitting only an employee to challenge certification is for the

purpose of limiting the instances of judicial review of a very difficult to define concept. A judgment on whether an employee was acting within the scope of his employment requires an intimate appreciation for all relevant information regardless of its admissibility in a trial court. Review by a court of the Attorney General's certification at the outset of the case would necessitate introduction of such information prior to discovery and could prejudice a defendant-employee's interests where certification is challenged by a plaintiff. An employee who could best evaluate the potential for prejudice is permitted to challenge the Attorney General's certification in order to protect against the possibility of an Attorney General determining that an employee's conduct was outside the scope of employment based on an overly narrow interpretation of the scope of employment standard. The subsection also provides both for certifications involving scope of office and employment as well as color of office. The latter is included to provide for those instances when a plaintiff sues an employee not knowing that the Federal Tort Claims Act is an available remedy. Certification by the Attorney General that the employee was acting solely under color of office would notify the plaintiff of his potential and available remedy against the United States even though he could elect to proceed solely against the employee. If the plaintiff chose to proceed against the United States in such instances, he would still be required to timely file an administrative claim under section 2672.

Subsection (d)(4) establishes that if a Federal Tort Claims Act lawsuit is dismissed because a form of federal compensation is the exclusive remedy of the plaintiff, that plaintiff can utilize the date of the filing of his claim or lawsuit to be the date upon

which his claim for compensation benefits was filed. The effect of this provision is to protect such a plaintiff against the

possibility that he would not be able to file a lawsuit because of compensation system coverage but that he would not be eligible to receive compensation because he waited too long to make a claim for such compensation benefits. This language is quite similar to language utilized in some of the statutes which have served to make specific categories of government employees (medical and paramedical employees of the Veterans Administration, the Public Health Service, and the Department of Defense) immune from suit.

Section 8

Section 8 adds to Section 2679 of Title 28 a new subsection (f) to assure that in certain cases appropriate disciplinary action be investigated and undertaken even if an aggrieved party decides not to initiate a disciplinary inquiry as provided by Section 13 of the Bill. The Bill does not, of course, completely immunize the federal employee from the consequences of his tortious conduct. If his conduct constitutes a criminal offense he may be prosecuted. The employee remains subject to disciplinary action, including dismissal, even if his conduct does not constitute a criminal offense.

Section 9(a)

Section 9(a) amends the preamble to section 2680 of title 28, to make clear that the exceptions to suit against the United States do not apply to tort claims arising under the Constitution. A proviso has been added by section 9(b), however, to exempt the Tennessee Valley Authority, the Panama Canal Company, Federal land banks, intermediate credit banks, and banks for cooperatives from even the Act's provisions relating to tort claims.

Section 9(c) amends section 2680(h) to eliminate existing provisions which provide that suit under the Federal Tort Claims Act cannot be based upon assault, battery, false imprisonment, false arrest, malicious prosecution, or abuse of process. Suits based upon those theories would be allowable against the United States if the Bill is passed. Several years ago this section was amended to provide that such suits could be brought against the United States if the acts were performed by certain law enforcement officers. Now such suits against the United States will be permissible and exclusive if committed by any federal employee.

Section 10

Section 10 is a technical "repealer" section. There are in existence a number of statutory provisions that provide the same type of immunity to selected categories of government employees. If this bill is passed the piecemeal statutes would no longer be required, and Section 10 repeals those provisions. The Bill would have the further advantage that the provisions of law would be encompassed within the Federal Tort Claims Act, rather than being scattered throughout the United States Code as is now the case.

Section 10 also changes the designation of certain other sections which will remain in existence. The provisions of the existing statutes which provide for departmental or agency discretion and authority to indemnify individual employees or to purchase insurance to protect them in situations where the Federal Tort Claims Act does not apply remain in effect. The only parts that are repealed are those that are redundant of the Federal Tort Claims Act if this Bill is passed.

Section 11

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Section 11 amends Section 2520, Title 18, United States Code, to provide that it shall not apply to civil causes of action against officers or employees of the United States while acting within the scope of their offices or employment, or under the color of such office or employment. It is necessary to provide expressly that the cause of action established by that Section does not apply to federal employees so as to provide for their immunity from all types of civil damage actions that may be brought under Section 2520.

Section 12

Section 12 makes the provisions of the Bill retroactive to all pending cases against government employees based on claims for which the United States would be subject to suit if the same actions were brought after enactment of the Bill. The retroactivity provision is intended to further those interests of the legislation which seeks to provide a more certain source of monetary recovery, protect federal employees from vexatious litigation, and significantly reduce the need of the Department of Justice to retain private counsel. The Section preserves the right to a jury trial as to all suits in which the right to seek a trial by jury has not expired, for all claims pending on the date of enactment, and for all causes of action known to the aggrieved party on or before the date of enactment. Should a party elect a jury trial, attorney's fees would be awarded pursuant to section 2678, liquidated damages would not be available, and the United States would be free to raise the absolute or qualified immunity of its employees as a defense to the claim.

Approved For Release 2004/08/19 : CIA-RDP81M00980R001900060002-4

Section 13

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Section 13 adds a new chapter to Title 5 of the United States

Code giving persons the right to initiate and participate in disciplinary inquiries of federal employees upon a demonstration or claim that the person has been subjected to a tort arising under the Constitution as a result of the act or omission of the federal employee who is the subject of the inquiry. The section is intended to serve as a counterpart to sections 1-12 which would make federal employees immune from civil liability for their acts or omissions giving rise to constitutional torts. Section 13 ensures that federal personnel will remain accountable for any constitutionally tortious conduct by replacing the possibility of civil liability with the more certain likelihood of a disciplinary inquiry triggered and participated in by the aggrieved party.

Section 7801 defines "person", "federal agency", "employee", "appointee of the President," and "disciplinary action." The word "person" is defined to mean any person with rights recognized under the Constitution of the United States. The definition is intended to include all natural persons as well as corporate or organizational entities to whom the courts may ascribe constitutional rights capable of supporting a cause of action based upon tortious injury arising under the Constitution.

Section 7802 sets forth the circumstances under which a person can initiate an administrative inquiry into conduct alleged or found to have caused tortious injury under the Constitution. Three situations are available. Under the first set forth by section 7802(a), a person must have obtained a monetary recovery from the United States on an administrative claim under section 2675 or from suit under section 1346(b) of title 28,

United States Code, where the award was for tortious injury
Approved For Release 2004/08/19 : CIA-RDP81M00980R001900060002-4
arising under the Constitution. Under the second circumstance described
in section 7802(b), a person need only bring suit under section 1346(b)
on a tort claim arising under the Constitution. Under
the third set forth in section 7802(c), the person may be invited
to participate by an agency which has initiated its own adminis-
trative inquiry independently of initiation by the complainant.

The rights of a person to participate in and seek administra-
tive and judicial review of the administrative inquiry are
dependent upon the particular subsection of 7802 which triggered
the person's involvement. A request or invitation to participate
in an administrative inquiry under sections 7802(a), (b) or (c)
entitles a person to all of the participatory opportunities set
forth in section 7803(b). The rights of a claimant proceeding
under sections 7802(a), (b) or (c) do not become distinguishable
until after the agency inquiry has terminated. At that point,
only the person proceeding pursuant to section 7802(a) may
seek administrative or judicial review. A person participating
in an agency's administrative inquiry pursuant to sections
7802(b) or (c) may not seek administrative or judicial review unless
the employing agency consents or unless the person obtains a mone-
tary recovery under the terms of section 7802(a) during or subsequent
to the inquiry. Section 7803(e) determines the right of a person
to seek administrative and judicial review of an agency's adminis-
trative inquiry.

The purpose of requiring the recovery of a monetary award for
tortious constitutional injury prior to initiation of a discipli-
nary inquiry is to ensure that a person's constitutional rights
have been injured thereby screening out frivolous complaints which

contain the potential for harassment and oversteering the agency's disciplinary review process. In recognition that a legitimately aggrieved person may have to endure several years of litigation prior to establishment of injury and receipt of an award, section 7802(b) permits such an individual to initiate and participate at the agency level in a disciplinary inquiry. A right to seek administrative and judicial review is withheld, however, until a person can establish tortious constitutional injury through the receipt of a monetary award. The deferral of a right to review under section 7802(b) is a reflection of the balance between the interest of the legitimately aggrieved individual in seeing that appropriate discipline is undertaken, and the interest of the agency and its employees in protecting both their review procedures and employee morale from alleged claims that lack merit.

Section 7802(c) permits an agency in its discretion to invite a potential claimant to participate in an administrative inquiry in order to ensure that the employee whose conduct is being investigated will not be resubjected to a second disciplinary inquiry should the potential claimant obtain a monetary award or file suit and initiate a later administrative inquiry under 7802(a) or (b). To this end, section 7802(d) provides that a person who participates in an administrative inquiry by filing suit under 7802(b) or by agency invitation under 7802(c), may not subsequently exercise any right under 7802(a) or (b) to request a second administrative inquiry into the same conduct.

Section 7803 sets forth a person's responsibilities and rights with respect to participation at an agency inquiry and subsequent administrative and judicial review. The process contains three

stages with the first being the agency inquiry conducted by the
Approved For Release 2004/08/19 : CIA-RDP81M00980R001900060002-4
agency which employs the individual alleged or suspected of

having committed a constitutional tort. The second stage is a review proceeding conducted by one of several administrative reviewing bodies independent of the agency which conducted the initial inquiry, and the third level is review by a federal court.

Section 7803(a) requires the person requesting an administrative inquiry under 7802(a) or (b) to submit as full and complete a statement of relevant facts as is known to the complainant. The complainant's role in the inquiry is not adversarial but rather that of a catalyst which initiates the proceeding and then offers evidentiary assistance. As a result, notice pleading permitted by the Federal Rules of Civil Procedure would be insufficient particularly where the inquiry is instituted pursuant to section 7802(b) and there has been no opportunity for development of relevant facts through litigation. Concomitant with the complainant's role as a producer of evidence, section 7802(a) contemplates that a complainant will assist the inquiry by furnishing any additional testimony or materials that may be needed to supplement his statement.

Section 7803(b) requires the agency inquiry to proceed without unnecessary delay. An inquiry lasting no longer than sixty days would seem appropriate for a single, well-identified constitutionally tortious act such as a warrantless entry in violation of the Fourth Amendment. Where the conduct in question was continuing in nature, involved a large number of individuals, or occurred far back in time, the agency inquiry might be expected to exceed sixty days but only in exceptional circumstances might it extend beyond 180 days. The

section contemplates that agencies will give prompt attention to requests for disciplinary inquiries brought under sections 7802(a) and (b).

The head of the agency or his designee is given discretion to control the length and extent of the inquiry depending upon the merits of the claim and the extent of disputes over material questions of fact. If after a preliminary inquiry the head of the agency or his designee determines that a complainant's claim of constitutional injury is clearly unsubstantiated, or that in the case of a bona fide claim the employee in question acted with an unquestionable good faith belief in the propriety of his conduct, the inquiry may be summarily terminated. If however, a preliminary inquiry reveals a genuine, material, and substantial dispute of fact which can be resolved with sufficient accuracy only by the introduction of reliable evidence in a hearing, and the agency's decision in the matter will likely depend on the resolution of such dispute, then a hearing must be held to resolve the dispute. A failure of an agency to hold a hearing under such circumstances may be appealed by the complainant to the reviewing administrative body or federal court which may instruct the agency to hold a hearing if required by the standards of review set forth in sections 7803(c) and (d).

In the event a hearing is held, the head of the agency or his designee may permit the complainant to examine or cross-examine witnesses or suggest witnesses to be called or documents to be produced. The decision of an agency not to permit a complainant to examine and cross-examine witnesses or to produce witnesses or documents suggested by a complainant will be final

and not subject to review by an administrative body under 7803(c)
Approved For Release 2004/08/19 : CIA-RDP81M00980R001900060002-4
or by a court under 7803(d).

As previously noted, the complainant's role in the disciplinary proceeding is of an evidentiary character only. In many cases examination of a witness by the complainant may be of assistance to the agency and is to be encouraged. In other instances, examination or even knowledge by the complainant of the identities of other witnesses examined by the agency, including the substance of their testimony, could clearly impair the overall functioning of the agency. Examples include testimony revealing targets of on-going criminal investigations, informants' identities, identities of employees acting in an undercover capacity, intelligence sources and methods, military and state secrets, inter- and intra-agency communications and deliberations, and other information normally privileged from disclosure to a plaintiff in the course of civil litigation. The nature of such information which is germane to an agency's inquiry must nevertheless be recorded for review by the administrative reviewing body or a federal court in the event of an appeal by a complainant or employee dissatisfied with the action taken by the agency.

In a similar regard, the head of an agency or his designee in notifying a person of the reasons for the agency's decision to discipline or not, may omit those reasons which would normally be privileged or unjustly invade the privacy of the employee whose conduct was subject to review. All reasons withheld, however, must be submitted to the reviewing administrative body in the event an appeal is sought.

Section 7803(c) provides for an independent review of an agency's administrative inquiry by one of six bodies set forth

in section 7805. The administrative reviewing body will determine
Approved For Release 2004/08/19 : CIA-RDP81M00980R001900060002-4
on the basis of the record compiled by the agency whether the
action taken by the agency was reasonable. The word "reasonable"
is intended to mean that the reviewing body will determine
whether the action taken by the agency was a reasonable course
to follow out of the options available based on the record
submitted even if the reviewing body might have selected a
different course of action had it been the employing agency. The
reviewing body cannot substitute its judgment for that of the
agency so long as the action taken was not unreasonable even
though a more satisfactory course of conduct might have been
available.

Should the reviewing body upon preliminary examination of
the record conclude that the record is inadequate to determine
whether the agency's action was reasonable, the reviewing body
may remand the record to the agency for further proceedings or,
in its discretion, the reviewing body may supplement the record
by taking additional evidence either in written form or through
a hearing. Vesting the administrative review body with the
authority to independently supplement the record is intended to
accommodate situations in which a relevant piece of evidence
or course of inquiry may have been unintentionally overlooked
by an agency during its review, or cases where the record submitted
suggests a less than full and vigorous investigation of a seemingly
meritorious complaint by an agency.

A reviewing body may affirm the action taken by an agency,
impose discipline if none was ordered, or adjust the type of
discipline imposed by the agency except where an agency's employees
have no right under other provisions of law to seek administrative

review of discipline entered against them. In such instances,
Approved For Release 2004/08/19 : CIA-RDP81M00980R001900060002-4
section 7807(d) provides that the administrative reviewing body
may increase but not decrease the severity of the disciplinary
action imposed. The reason for restricting the authority of the
administrative reviewing body to reduce the severity of discipline
is to maintain the current status of those employees who are part
of an exempted service and not permitted to challenge the degree
of discipline imposed by their agencies.

Section 7803(d) provides for judicial review of a final
decision by the reviewing body. A court may affirm the decision
of the reviewing body or set it aside and remand to the reviewing
body or employing agency for further proceedings if it finds the
decision arbitrary or capricious, or finds material factual deter-
minations unsupported by substantial evidence. The court's
review will be limited to an examination of the record compiled
by the employing agency and administrative reviewing body. Pro-
vision is made for in camera review of those portions of the
record normally privileged from disclosure to a private party
in the course of civil litigation.

Section 7803(e) provides a right of review by an administrative
body and a federal court only to persons who have obtained a
monetary recovery from the United States on a claim under section
2675 or on a suit under section 1346(b) of title 28, United States
Code, arising under the Constitution of the United States. The
purpose of the subsection is to screen out claims lacking merit and
to allow only those persons with substantiated constitutional
tort claims to institute an independent review of an agency's
administrative inquiry into alleged wrongdoing. The right to

review will accrue to a person whenever a monetary recovery is obtained for a constitutional tort even in those cases where a person initiated an administrative inquiry upon the filing of a suit under section 1346(b) as permitted by section 7802(b).

An Agency which has invited a potentially aggrieved person to participate in an administrative inquiry may in its discretion under section 7803(e), permit the person to seek administrative and judicial review even if the individual has not yet obtained a monetary award in satisfaction of a constitutional injury. The provision is intended to protect an employee whose conduct has been the subject of the agency's inquiry from being subjected to a second round of examination at an uncertain point in the future when the aggrieved party secures a monetary award. An agency's decision not to permit a party to obtain review of its action when the person has no independent right to do so, is not reviewable by an administrative body or a court.

Section 7804 sets forth procedures for examining the conduct of former employees and current and former Presidential employees who are beyond the reach of normal disciplinary procedures contemplated by section 7803. Section 7804 permits a person who has established a constitutionally tortious injury under section 7802(a) to request one of six administrative reviewing bodies described in section 7805 to investigate the alleged improper conduct, make findings, and publish them in a report. A finding of improper conduct would constitute a public reprimand thereby serving as an indirect sanction for the offending conduct.

In order to ensure that a former employee or current or former Presidential appointee is not unfairly charged with

improper conduct, section 7804(b) permits the individual whose conduct is the subject of the report to submit a statement in rebuttal to the reports' finding which shall be made a part of the report prior to public release.

Section 7805 describes the independent administrative reviewing body or individual which will review the administrative inquiry of an employing agency under section 7803(b), or the conduct of a former employee or current or former Presidential appointee under section 7804. The section contemplates that unless otherwise specified, the reviewing body will be the Merit Systems Protection Board. Five separate reviewing bodies or individuals are designated in addition to the Merit Systems Protection Board to handle disciplinary inquiries of a specialized nature.

These include the Secretary of Defense for uniformed members of the Armed Forces, the Secretary of the Department in which the United States Coast Guard is operating, the head of an agency with a personnel system under the Foreign Service Act of 1946, the head of an agency with a personnel system under the Public Health Services Acts, and a Presidentially appointed body to review conduct of an officer or employee while engaged in intelligence activities. The section does not contemplate an election of reviewing bodies or individuals by the employee or complainant. However, where an employee is engaged in both law enforcement and intelligence collection activities and law enforcement conduct alone would be reviewed, for example, by the Merit Systems Protection Board and intelligence

conduct by a Presidentially appointed body, the appropriate reviewing body will be determined by the employing agency based on the predominant character of the employee's conduct which is the subject of the agency's administrative inquiry.

In order to ensure that the administrative review is conducted independently of an agency's inquiry, section 7805(g) provides that the agency head or its designee conducting the review shall not be responsible to or subject to the supervision or direction of the agency designee who conducted the administrative inquiry under review.

Section 7806 provides for the implementation of regulations to effectuate Section 13 of the Bill. The section intends a two stage implementation of regulations. In the first stage, the administrative reviewing individuals and bodies described in section 7805 will promulgate regulations within 90 days of the Section's enactment, to be followed by a second stage 60 days later when each federal agency will issue its individual rules, regulations, and instructions consistent with the regulations issued by the appropriate administrative body designated by section 7805 to review the agency's disciplinary actions under section 7803(c). An agency's own rules, regulations and instructions will not only be consistent with those of its designated reviewing body, but will also be tailored to meet its particular agency function and structure.

Subsection (b) provides that those regulations issued by the Merit Systems Protection Board shall be approved by the Attorney General. Under the provision of subsection 7805(b), the Merit Systems Protection Board will review the discipline actions of such Federal law enforcement agencies as the Federal Bureau of Investigation, the Bureau of Alcohol, Tobacco and Firearms, the U.S. Customs Service,

the Immigration and Naturalization Service and the Department of Justice
Administration. Approved For Release 2004/08/19 : CIA-RDP81M00980R001900060002-4

The regulations governing the review of the discipline actions of these agencies should be sensitive to the particular problems associated with the enforcement of our Federal criminal laws. Accordingly, those regulations are to be approved by the Attorney General, the country's chief law enforcement officer. To ensure that potential complainants be able to review these regulations, subsection 7806(e) requires that the regulations be published for public comment and subject to judicial review under the provisions of chapters 5 and 7 of title 5, United States Code.

Section 7807 sets forth several miscellaneous provisions intended to clarify the effect of Section 13 on existing disciplinary procedures. Sections 7807(a)-(c) are intended to make clear that no right otherwise available under law to an employee respecting disciplinary action will be abridged by provisions of Section 13. An employee who has a right under law to appeal a disciplinary action taken against him to the Merit Systems Protection Board and then to a federal court would continue to have that right. In order to expedite the process, however, section 7807(a) provides that in the event a complainant seeks administrative review by the Merit Systems Protection Board under Section 7803(c), the employee would not have to appeal to the Board prior to seeking judicial review.

In those instances where an employee would normally not be entitled to seek administrative review of the disciplinary action imposed against him by his agency, section 7807(b) provides that in the event a complainant seeks administrative review under section 7803(c), the employee shall be given all the rights of

Approved For Release 2004/08/19 : CIA-RDP81M00980R001900060002-4
participation accorded the complainant. In such instances, however, an employee could seek judicial review to the extent provided by section 7803(d) if the discipline imposed by the reviewing body under section 7803(c) was greater than that imposed by the employee's agency under 7803(b). If the reviewing body affirmed the level of discipline imposed by the employing agency, the employee would not be permitted to seek judicial review. Such a result would be inconsistent with the fact that the employee would not otherwise have a right to seek judicial review of the discipline imposed by his agency. Should the complainant petition for judicial review in such a case, the employee would still not be permitted to participate for the reason that his interest in not increasing the amount of discipline imposed by his agency will be adequately represented by the agency during the judicial review process. The employee's interest in reducing the severity of the discipline will be of no importance because of his inability to seek judicial review under other provisions of law in the first instance.

Sections 7807(a) and (c) recognize but do not attempt to resolve procedural conflicts that may arise when an employee pursues a course of review separate from that available to a complainant. Examples of such may include an employee electing to appeal a decision of the Merit Systems Protection Board under the civil service statutes while the complainant seeks immediate judicial review under section 7803(d), or an employee electing to pursue judicial review before the United States Court of Claims while the complainant proceeds before a United States district court. Section 7807 contemplates that resolution of the conflicts will turn on the particular circumstances of each conflict with appropriate courts or

administrative proceedings in the interest of comity and expeditious resolution of matters in dispute.

Section 7807(c) provides that no part of Section 13 of the Bill is intended to adversely affect the availability of defenses which an employee may otherwise raise in any administrative or judicial proceeding. The section is intended to make clear that defenses such as an employee's good faith belief in the propriety of his conduct, which would normally be available to mitigate or eliminate the imposition of disciplinary sanctions, remain available even though Section 3 of the bill precludes their assertion by the United States in defense of a civil action alleging a tort arising under the Constitution.

Section 7807(d) and (e) are intended to ensure that an agency will not delay the initiation of a disciplinary inquiry independently of a request by an aggrieved party. The purpose of Section 13 is to ensure that a valid administrative inquiry into possibly offending acts or omissions takes place whenever just cause exists to believe improper and constitutionally tortious conduct has occurred. While the purpose is effectuated by providing for citizen initiation and participation in the inquiry, it would be anomalous to the Section's intent to discourage an agency from taking independent action prior to citizen initiation. A salutary aspect of the Section should be to encourage agencies to undertake early and vigilant review of possibly improper conduct in order to avoid probable but yet belated examination through victim involvement.

Section 7806(f) provides for an annual report by the President to the Speaker of the House and the President of the Senate

listing for ~~Approved For Release 2004/08/19 : CIA-RDP81M00980R001900060002-4~~
administrative inquiries undertaken pursuant to Section 13
and the disposition of each inquiry including the results of
administrative and judicial review.

Section 7807(g) provides for the recovery from the United States of reasonable attorneys' fees and other reasonable costs of litigation incurred during judicial review under section 7803(d) where the complainant or subject of a discipline action seeking judicial review is afforded the relief sought in substantial measure. Attorneys' fees and related costs may not include fees and costs incurred at the agency or administrative review levels under sections 7803(b) or (c).